STATE OF MICHIGAN

COURT OF APPEALS

RICHARD SCHNETTLER and RITA SCHNETTLER,

Plaintiffs-Appellants,

v

SHREE KRISHNA ENTERPRISES, INC.,

Defendant-Appellee.

UNPUBLISHED
September 21, 2006

No. 269284
Allegan Circuit Court
LC No. 05-037167-NI

Before: Borrello, P.J., and Jansen and Cooper, JJ.

PER CURIAM.

In this slip-and-fall case, plaintiffs appeal as of right from the circuit court's order granting summary disposition to defendant. We affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiffs, who were registered as guests at defendant's hotel, went for a swim in the pool on the morning of June 10, 2004. Plaintiff[1] stated that he entered the pool area wearing a shirt, bathing suit, and rubber-soled athletic shoes, and carried a towel provided by defendant. Shortly after getting into the pool, plaintiff left the water and, without using the towel to dry himself off and without putting on his shoes or other clothing, walked toward the restroom, which was across the hall from the pool. The floor of the hallway leading to the restrooms included some tiles of the slip-resistant kind used in the pool area, but was primarily composed of tiles of the smoother kind used in the hotel's guest bathrooms. Plaintiff had taken two or three steps into that hallway when he slipped and fell to the ground, sustaining injury.

Plaintiffs brought suit, alleging that, as a direct result of a negligent breach of duty on defendant's part, they suffered injuries and damages. Defendant filed a motion for summary disposition, arguing that the tile floor, with its corresponding risk of slipping on tile when

[1] Because plaintiff Rita Schnettler's interest in this case is derivative of that of her husband, Richard Schnettler, use of the singular "plaintiff" in this opinion will refer exclusively to the latter.

walking with wet feet, was an open and obvious hazard. The trial court agreed, and granted the motion. This appeal followed.

Plaintiffs assert that the trial court erred in finding the hazard was open and obvious, that even if the hazard was open and obvious, it was effectively unavoidable, and that the doctrine is inapplicable because the fall resulted from defendant's active negligence. We find no merit in any of these arguments.

I. Premises Liability

The possessor of a premises does owe invitees a duty to exercise reasonable care to protect against unreasonable risk of harm caused by dangerous conditions on the premises, but this duty does not extend to reach open and obvious hazards. *Lugo v Ameritech Corp*, 464 Mich 512, 516; 629 NW2d 384 (2001). However, if a hazard is open and obvious, but is also "effectively unavoidable" or "unreasonably dangerous," then the premises possessor does have a duty to protect invitees from the danger the hazard presents. *Lugo, supra* at 518.

The first issue here then is whether an average person of ordinary intelligence knows, or should know, that a danger of slipping exists when one walks on a tile floor with wet feet. Plainly the answer is yes.[2] Although the danger is therefore open and obvious, still we must consider whether the wet floor near the pool was an unavoidable or excessive hazard.

Plaintiffs argue that even if the risk of slipping on wet tile was open and obvious, the risk was unavoidable because the tiled hallway was the only route to the restrooms. We disagree. Open and obvious hazards are "effectively unavoidable" only when a person must confront them in order to accomplish a necessary task. *Lugo, supra* at 518.

Here, to avoid walking on ceramic tile with wet feet, plaintiff could have used the towel provided by the hotel to dry himself, or he could have put back on the shoes he had worn to walk to the pool. Because both of these options would have reduced the risk to plaintiff, we reject the argument that he could not avoid walking on the tile with wet feet.

Plaintiff further argues that tiling the hallway from the pool to the restrooms created an excessive hazard. Again, we disagree. Floors that are likely to become wet are commonly tiled. This construction choice made by defendant bears no reasonable resemblance to the *Lugo* court's example of an unreasonably dangerous hazard, the "thirty foot deep pit in the middle of a parking lot"; the situation simply lacks the "special aspects that give rise to a uniquely high likelihood of harm or severity of harm." *Lugo, supra* at 518-519.

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[2] The trial judge noted that he is "not a fan" of the open and obvious doctrine as a defense to liability. We note that in its current iteration, governed by the reasonably prudent person standard rather than by the facts and circumstances of each individual plaintiff in each individual case, the open and obvious doctrine does give one pause. See, e.g., *Sidorowicz v. Chicken Shack, Inc.*, 469 Mich 919, 673 NW2d 106 (2003). However, this case does not qualify for such pause.

II. Active Negligence

Plaintiffs argue that the open and obvious doctrine does not apply because this is a case of active negligence, not of premises liability. Plaintiffs assert that defendant was actively negligent[3] when defendant replaced the carpet that had formerly covered the hallway with the ceramic tile at issue here, and in removing mats that sometimes covered the tiles.

Plaintiff is correct that the open and obvious doctrine is inapplicable to an ordinary negligence claim, as opposed to a premises liability claim. *Laier v Kitchen,* 266 Mich App 482, 484; 702 NW2d 199 (2005). However, we reject plaintiff's argument that this claim sounds in negligence rather than premises liability. We find that where an injury arises out of a condition on the land, rather than out of the activity or conduct that created that condition, the action lies in premises liability. *James v Alberts*, 464 Mich 12, 18-19; 626 NW2d 158 (2001).[4] Here plaintiff's injury arose from wet feet on ceramic tile, not from defendant's actions in removing the carpet, installing the tile, or failing to keep mats over the tile at all times.

We note also that if plaintiff were able to proceed on a negligence theory, we would find that plaintiff has failed to prove a breach of the duty of care by defendant. Plaintiffs cite no authority for the proposition that removal of carpet or mats is itself a negligent act, nor do they point to evidence that the tile used in the hallway where the fall occurred was defective or otherwise an improper choice of flooring. Defense counsel stated in the hearing on the motion for summary disposition that plaintiff's injury was the first such injury to have occurred since the tile floor was installed. And we add that plaintiff himself had already traversed that very same hallway without incident when on his way to the pool.

We find that the open and obvious doctrine applies and bars this premises liability claim.

Affirmed.

/s/ Stephen L. Borrello
/s/ Kathleen Jansen
/s/ Jessica R. Cooper

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[3] Active negligence may be equated with actively pursuing negligent behavior. See *Johnson v A & M Custom Built Homes, LPC*, 261 Mich App 719, 725; 683 NW2d 229 (2004). See also, generally, *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695; 644 NW2d 779 (2002).

[4] In *James*, Plaintiff sued defendant for injuries that arose while the two were digging a trench; plaintiff asserted the injury "arose out of a condition of the land, not out of the activity itself." The Court stated: "In order to provide guidance on remand, we note that the present case is a premises liability action."